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No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*, RESPONDENTS

On Writ of Certiorari to the Supreme Court of Arkansas

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THE RETROACTIVITY OF *SCHEINER* IS A REVIEWABLE FEDERAL QUESTION

A. The Eleventh Amendment Does Not Bar Review By This Court Of A State Court Judgment That Rests On An Interpretation Of Federal Law

This Court has long recognized that the Eleventh Amendment does not limit its appellate jurisdiction over final judgments rendered by state courts (see 28 U.S.C. § 1257) in cases involving monetary claims against a state, even though the Amendment might foreclose the federal courts from assuming original jurisdiction over such claims. See, *e.g.*, *Smith* v. *Reeves*, 178 U.S. 436, 445 (1900); cases cited at page 3, *infra*. And the Court has frequently exercised this authority, as it did in *Scheiner* itself with respect to the repealed $25 marker fee, and again as recently as last month in *Texas Monthly, Inc.* v. *Bullock*, No. 87-1245 (Feb. 21, 1989) (refund claim with respect to repealed tax); see also pages 3-4, *infra*.

Without even mentioning this settled understanding, Arkansas advances (Br. 13-23) the revolutionary contention that the Eleventh Amendment prevents this Court from reviewing the Arkansas Supreme Court's determination of federal law in this case (see also Florida Br. 30-39). Precedent, and the history and purposes of the Eleventh Amendment, demand the rejection of this bold attempt to diminish this Court's authority as the final arbiter of the meaning of federal law.[1]

1. The Eleventh Amendment contention depends entirely on the construction underlying *Hans* v. *Louisiana*,

[1] It is instructive that respondents' novel argument has not been endorsed by any of the nationwide organizations or individual states that have appeared as *amici curiae* supporting affirmance in this case.

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134 U.S. 1 (1890), that the Amendment restricts the federal courts' original jurisdiction not only in cases in which jurisdiction derives from the identity of the parties but also in federal question cases. The Court has before it in other cases the question whether *Hans* should be reconsidered. If the Amendment is held not to limit the federal courts' original jurisdiction over claims arising under federal law (see *Welch* v. *Texas Dep't of Highways*, 107 S.Ct. 2941, 2958-2970 (1987) (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting)), there is obviously nothing left of respondents' attack on the Court's appellate federal question jurisdiction.

It has been suggested that, even if *Hans* was incorrectly decided as an original matter, *stare decisis* justifies adherence to the *Hans* rule. *Welch*, 107 S.Ct. at 2948-2957 (plurality opinion); see also *id.* at 2957-2958 (Scalia, J., concurring in the judgment). If the Court were to let *Hans* stand for that reason, there would of course be no basis for extending *Hans* for the first time to this Court's appellate jurisdiction. Indeed, the very policy of *stare decisis* that might counsel adherence to *Hans* with respect to the federal courts' original jurisdiction weighs strongly against extending that decision to upset the settled view of the scope of this Court's appellate jurisdiction.

2. Even if the Court were to reaffirm *Hans* on the merits, respondents' claim must be rejected. Contrary to their assertion (Br. 19), this Court has never held that the Eleventh Amendment constricts its appellate jurisdiction over cases coming from a state court.[2] The Court

[2] Respondents rely upon a single case—*Louisiana ex rel. New York Guar. and Indem. Co.* v. *Steele*, 134 U.S. 230 (1890)—but that decision in fact rests on the view (later repudiated in *Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980)) that the Eleventh Amendment limits *state* courts' jurisdiction over claims against a state. In *Steele*, the Louisiana Supreme Court relied on Eleventh Amendment

instead has repeatedly recognized that when an action against a state is barred from the federal courts' original jurisdiction by the Eleventh Amendment, "[o]f course, a [plaintiff] denied rights secured to him by the Constitution and laws of the United States, and specially set up by him, could bring the case [to this Court] by writ of error from the highest courts of the state." *Chandler* v. *Dix*, 194 U.S. 590, 592 (1904); see also, *e.g.*, *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 470 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 57 (1944); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 246 n.5 (1931); *Smith* v. *Reeves*, 178 U.S. at 445; *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 256 n.8 (1985) (Brennan, J., dissenting); *General Oil Co.* v. *Crain*, 209 U.S. 211, 233 (1908) (Harlan, J., concurring); *Proprietors of the Charles River Bridge* v. *Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 585 (1837) (Story, J., dissenting).

In fact, the Court has entered judgment on the merits in more than 60 cases from state courts in which—under respondents' theory—it lacked appellate jurisdiction because the Eleventh Amendment placed the action outside the federal courts' original jurisdiction. These cases consist of suits against states seeking tax refunds on a variety of federal statutory and constitutional grounds,[3] actions to recover retroactive benefits allegedly

decisions to hold that Louisiana state courts lacked jurisdiction to entertain the suit because it was in effect one against the State (38 La. Ann. 337, 340-341 (1886)), and this Court concurred on essentially the same basis that there was no original jurisdiction in the Louisiana courts. Significantly, this Court did not dismiss the appeal or otherwise suggest that *it* lacked appellate jurisdiction. *Steele* thus actually supports the view that the Eleventh Amendment does *not* limit this Court's appellate jurisdiction.

[3] The tax refund cases are listed in the Appendix to this brief. Arkansas attempts (Br. 19-20 n.9) to distinguish some of these cases on the ground that, even though they were suits for refunds, this Court "refrained from addressing the propriety of that remedy." See also Florida Br. 35 n.33. This purported distinction, however,

denied in violation of the Constitution,[4] claims for money damages sounding in contract or tort,[5] and suits against a state in its own name.[6] It apparently was not argued

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is inconsistent with Arkansas' own theory (Br. 18) that "[t]he scope of the Eleventh Amendment's reach is * * * defined at the outset of * * * litigation" by the alignment of the parties and the nature of the relief sought, not on the basis of the particular legal issue brought before this Court. To the extent that this distinction is credible, it shows that this Court *does* have jurisdiction in the present case. The only issue decided by the Arkansas Supreme Court and presented here is whether *Scheiner* is retroactive, not whether Arkansas must pay petitioners a refund.

Arkansas' attempted distinction (Br. 23) of *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), is also unavailing: the Court never held or even intimated that suits by individual Indians were the equivalent of suits by the United States for Eleventh Amendment purposes.

[4] *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Arkansas attempts (Br. 19-20 n.9) to distinguish *Thomas* on the ground that "the Court expressed no view about whether [the unemployment] benefits were to be paid retroactively." But Thomas had sought judicial review of the administrative denial of his benefits claim, not prospective relief; there can be no doubt that the case concerned his right to retroactive benefits.

[5] *Martinez* v. *California*, 444 U.S. 277 (1980); *Baltzer* v. *North Carolina*, 161 U.S. 240 (1896); *Railroad Co.* v. *Alabama*, 101 U.S. 832 (1880)); *Railroad Co.* v. *Tennessee*, 101 U.S. 337 (1880); *Curran* v. *Arkansas*, 56 U.S. (15 How.) 304 (1853). Arkansas tries to distinguish *Martinez* (Br. 19-20 n.9) on the ground that, on the merits, the Court rejected the constitutional challenge to the state statute. But if the Eleventh Amendment barred the Court's exercise of appellate jurisdiction, it would have been unable to enter *any* judgment respecting the merits of the federal claim.

[6] *Summa Corp.* v. *California ex rel. Lands Comm'n*, 466 U.S. 198 (1984); *Bonnelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973); *Hughes* v. *Washington*, 389 U.S. 290 (1967). Arkansas argues (Br. 19-20 n.9) that *Summa* and *Bonnelli Cattle* are distinguishable because the relief sought "could have been accomplished through an order to state officers." However, this Court held in *Alabama* v. *Pugh*, 438 U.S. 781, 781 (1978), that "the Eleventh Amendment prohibits federal courts from entertaining suits * * * against States and their agencies," including suits seeking purely prospective relief.

in any of these cases that the Eleventh Amendment circumscribed this Court's appellate jurisdiction. "These decisions nevertheless 'have much weight, as they show that this point neither occurred to the bar or the bench.' The fact that no such argument was even made illuminates the profession's understanding of" the scope of the Eleventh Amendment. *United States* v. *Ross*, 456 U.S. 798, 819 (1982) (citation omitted).

3. The distinction drawn by this Court between the federal courts' original jurisdiction and this Court's own appellate jurisdiction is strongly rooted in the history and purposes of the Eleventh Amendment.[7]

First, the Amendment was adopted to overrule this Court's decision in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that the Court's *original* jurisdiction extended to a suit against a state on a state-law claim. The focus of the Amendment was thus the federal courts' original jurisdiction; there is no evidence that the proponents of the Amendment also intended to constrain the Court's appellate jurisdiction over cases decided by state courts. Indeed, "[h]ad the amendment been regarded as immunizing the states from the federal appellate process, it is almost inconceivable that it would have enlisted such broad support" from the Federalist majority in Congress. C. Jacobs, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 93 (1972).

The fact that an action might be permissible in a different form does not empower a court to ignore the Eleventh Amendment bar.

[7] Arkansas makes much (Br. 15, 17-18) of the text of the Eleventh Amendment, but this Court's decisions are noteworthy for their willingness to depart from the literal language in construing that provision. *Hans* itself expands the scope of the Amendment well beyond its plain language to encompass suits against a state by its own citizens. See also *Monaco* v. *Mississippi*, 292 U.S. 313 (1934) (suits by a foreign state barred). Moreover, to the extent respondents invoke the Amendment's plain language, they must overcome the fact (which they do not even address) that in light of its last 14 words the Amendment is most naturally read not to encompass federal question cases at all. See *Welch*, 107 S.Ct. at 2962, 2964-2965 (Brennan, J., dissenting).

Second, the Court's refusal to apply the Eleventh Amendment to limit its appellate jurisdiction is easily justified under the analysis the Court has used to distinguish between actions for retrospective relief (which are not within the federal courts' original jurisdiction) and suits seeking prospective relief. This distinction is designed to reconcile the competing interests in federal supremacy and state sovereignty by "permit[ting] the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States' " while at the same time "preserving to an important degree the constitutional immunity of the States." *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105-106 (1984) (citation omitted).

Review by this Court of questions of federal law decided by a state court in actions commenced against a state is at most an inconsequential intrusion upon state sovereignty. In virtually all such cases, a state court has previously determined that it had the power to bind the state by its adjudication of the federal law issue, either because there was no claim of sovereign immunity by the state, because such a claim was rejected, or because the state court found it unnecessary to dispose of the immunity claim in order to decide the federal law issue on the merits. In the present case, for example, the Arkansas Supreme Court decided an issue of federal law related to the merits of petitioners' claim without addressing Arkansas' assertion that refunds are barred by sovereign immunity.[8] Where, as here, a state has consented

[8] The State's contention (Br. 14 & n.4) that the court below held the present suit barred by sovereign immunity is preposterous. The State's sovereign immunity argument was thoroughly aired before the Arkansas Supreme Court, yet there is not a single word in that court's opinion addressing the issue. See *Michigan* v. *Long*, 463 U.S. 1032, 1044 (1983). Moreover, the Arkansas Supreme Court already has held that Article 16, Section 13 of the Arkansas Constitution, which prohibits illegal exactions, (1) applies to state as well as local taxes (see *Streight* v. *Ragland*, 655 S.W.2d 459, 461 n.6 (Ark. 1983)), and (2) provides for monetary refunds as well as prospective equitable relief (see *City of Little Rock* v. *Cash*, 644 S.W.2d

to be sued on an issue implicating federal law, it is difficult to see how this Court's examination of the federal law question already decided by the state court could effect an undue intrusion into state affairs.

On the other hand, this Court's ability to exercise appellate jurisdiction over state court decisions interpreting federal law is critical to maintaining the supremacy of federal law. See *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-351 (1816). As we have discussed (see pages 3-4, *supra*), application of the Eleventh Amendment to the Court's appellate jurisdiction would work a substantial diminution in the Court's authority. The disposition of federal constitutional and statutory issues in entire classes of cases—suits for certain government benefits, claims for tax refunds, actions in inverse condemnation—would be left entirely to state courts, free of any concern that this Court might review and reverse their decisions. Such a wholesale reduction in this Court's jurisdiction would injure to an intolerable degree the fundamental interests in uniform application of federal law and vindication of federal rights.[9]

229, 237 (Ark. 1982), cert. denied, 462 U.S. 1111 (1983)). Indeed, at an earlier stage of this very case, petitioners were paid refunds of HUE taxes collected pursuant to invalid emergency regulations. Pet. App. 32a. See also *Ragan* v. *Venhaus*, No. 82-4503 (Pulaski Cty. Ch. Ct. July 22, 1987), on remand from 711 S.W.2d 467 (Ark. 1986) (ordering State to refund "collection fee" to taxpayers from state treasury).

For this reason, there is no need to consider Arkansas' argument (Br. 17) that a decision by this Court overturning a state court ruling resting on sovereign immunity would intrude deeply upon state sovereignty. Whatever the merits of that contention, this is not such a case: the Arkansas Supreme Court denied petitioners refunds of illegal HUE taxes based solely on its federal law holding that this Court's decision in *Scheiner* was not retroactive, not because the claim was barred by sovereign immunity.

[9] Moreover, application of the Eleventh Amendment in this manner would lead to anomalous results. For example, the Court would have jurisdiction to review state court judgments in eminent domain actions instituted by the state but could not review the disposition of identical federal issues arising in inverse condem-

For these reasons, the State's facile syllogism (Br. 17) that the Framers of the Eleventh Amendment would have been as offended by appellate review of federal questions decided by state courts as they were by the Court's exercise of its original jurisdiction in *Chisholm* to impose liability on a state law ground is completely unsound.

B. There Is No Merit To The Other Reasons Offered By Respondents And Their *Amici* For Not Reaching The Retroactivity Issue

1. In yet another effort to avoid the retroactivity issue on which the Court granted certiorari, Arkansas contends (Br. 23-28) that the Constitution does not require a refund of taxes collected in violation of the Commerce Clause. In respondents' view (*id.* at 24), "[t]he Commerce Clause, by its terms, confers no constitutional rights of any sort on petitioners, much less a right to monetary relief." Arkansas' argument not only is inconsistent with longstanding precedent,[10] but, more importantly for present purposes, is irrelevant to this case.

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nation actions. Similarly, a taxpayer who paid a state tax and then sued for a refund on the ground that the tax violated the Constitution could not invoke this Court's jurisdiction, while a taxpayer who refused to pay the same tax—and was sued for nonpayment by the state—could obtain review of the state court's disposition of his federal claim. Compare *Ashland Oil, Inc.* v. *Rose*, No. 88-421 (juris. statement filed Sept. 9, 1988). Indeed, this anomaly in the tax context would give taxpayers an incentive to withhold payment of questionable taxes and would encourage courts to look more favorably on requests for preliminary injunctive relief—thus leading to more disorderly and intrusive litigation of federal challenges to state taxes.

[10] Under respondents' theory, a taxpayer's right to restitution of taxes exacted in violation of the federal Constitution would be entirely dependent on state law. But "the right to recover taxes illegally collected" under federal law cannot be "unduly circumscribed by state law." *Jackson County* v. *United States*, 308 U.S. 343, 350-351 (1939), citing *Ward* v. *Love County*, 253 U.S. 17 (1920), and *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); see also *District of Columbia* v. *Thompson*, 281 U.S. 25, 31 (1930) (citing *Ward* for the principle that "no statute is required to impose upon the

Contrary to the State's apparent assumption, petitioners' refund claim relies principally on Article 16, Section 13 of the Arkansas Constitution, which provides a refund remedy for "illegal exactions." See J.A. 22; Pet. Br. 38. This provision gives petitioners a state cause of action to recover the unlawful HUE taxes and obviates the need for them to proceed directly under the Constitution. Furthermore, it is beyond dispute that this state law remedy authorizes the refund of state taxes illegally exacted in violation of the Commerce Clause, because the Arkansas Supreme Court ordered that petitioners be given a refund of all HUE taxes paid after August 14, 1987, the date of Justice Blackmun's escrow (Pet. App. 5a). If Arkansas were correct that there is no cause of action to obtain refunds "when a state tax law is struck down under the negative Commerce Clause" (Ark. Br. 28), there would have been no legal basis for these refunds. Arkansas never confronts this fatal flaw in its position.

As the case comes to this Court, therefore, it must be assumed that state law authorizes the refund of taxes "illegally exacted" in violation of the Commerce Clause and that petitioners would be entitled to recover the illegal HUE taxes if *Scheiner* is retroactive. See note 8, *supra*. In that posture, the retroactivity issue is squarely presented.

2. Arkansas and all but one of its *amici* agree that the retroactivity of *Scheiner* is a question of federal law. However, *amici* National Conference of State Legislatures, *et al.* (NCSL), assert that state rather than

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city a legal obligation to make restitution" of money held "in its treasury * * * which it has no right in equity, good conscience, or common honesty to retain"). Thus, as this Court explained in *Montana Nat'l Bank* v. *Yellowstone County*, 276 U.S. 499, 504-505 (1928), a taxpayer

> cannot be deprived of its legal right to recover the amount of the taxes unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

federal law should govern the retroactivity of a federal constitutional decision of this Court where, as here, it arises in the course of a tax refund proceeding in state court. We doubt that this contention may properly be interjected at this stage of the case. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981).

In any event, NCSL's claim cannot be taken seriously. No doctrinal support is offered for the novel and counter-intuitive proposition that the retroactivity of this Court's constitutional rulings should vary from state to state and context to context. Under NCSL's theory, *Scheiner* could, for instance, be retroactive in Vermont but not in Arkansas, or it could be governed by federal law in a criminal prosecution for nonpayment of taxes (see NCSL Br. 11-12 & n.8) but not in a civil suit to recover the same taxes.[11]

In light of these difficulties, it is hardly surprising that NCSL is unable to cite a single case involving the retroactivity of this Court's decisions in which a state court has held that the issue is controlled by state rather than federal law. Indeed, this Court itself has decided retroactivity issues as matters of federal law in both civil and criminal cases from state courts. See, *e.g.*, *Reed* v. *Campbell*, 476 U.S. 852 (1986); *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). See also *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362 (1984), which holds that the collateral estoppel effect to be given the Court's constitutional decisions in a state court proceeding raises "federal issues" that serve to prevent "a state court [from] disregard[ing] a federal constitutional ruling of this Court."

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[11] The authorities relied on by NCSL are plainly inapposite. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), involved the retroactivity of a ruling of *state* law, not a federal rule. See also *Wainwright* v. *Stone*, 414 U.S. 21 (1973) (same). As the Court explained in *Lemon II*, 411 U.S. at 200 n.2, "*Sunburst* does not, of course, suggest that we may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court."

The Court has repeatedly applied the same principles in the context of the retroactivity of decisions invalidating state taxes under the Commerce Clause. Thus, in several recent state tax cases, the Court has left questions concerning retroactivity and refunds to the state courts "*in the first instance*," since "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 277 (1984) (emphasis added). See also *Tyler Pipe Indus.* v. *Wash. Dep't of Revenue*, 107 S.Ct. 2810, 2823 (1987). This language (which NCSL curiously omits from its quotes) refutes the state law assertion; if NCSL's claim were correct, the Court could not have treated the remand in *Bacchus* and other cases as a discretionary matter, as it plainly did, but instead would have been obligated to remand for the state courts to have the final (not just the first) word on retroactivity.

The equal protection cases cited by NCSL (Br. 17, 24-25) and Florida (Br. 9-15) are also wide of the mark. Those cases do hold that it is for the state to decide whether to redress unconstitutional underinclusiveness by extending the benefits to the disfavored class or withdrawing them from the favored class (subject, however, to federal review of the adequacy of the means chosen). But they most assuredly do *not* hold that the state may confine itself to a prospective remedy, which "would not relieve the harm inflicted during the time" the discriminatory provision was in effect (*Bacchus*, 468 U.S. at 267 n.7). See also *Montana Nat'l Bank* v. *Yellowstone County*, 276 U.S. 4[illegible], 504-505 (1928) (a prospective correction "does not cure the mischief which had been done under the earlier construction"). To the contrary, the Court has never even remotely suggested that the provision of a prospective remedy would obviate retrospective relief necessary to correct past discrimination; a state that denied benefit payments to blacks or women could not avoid make-whole compensation simply

because it agreed to refrain from such treatment in the future.[12]

Finally, it is clear—and NCSL does not dispute—that the Arkansas Supreme Court applied this Court's *Chevron* test in this case. That ruling contains "no state-law overtones that, by any stretch of the imagination, could serve to insulate the case from review here." *Limbach*, 466 U.S. at 361-362. Indeed, even had the court below viewed the retroactivity question as a matter of state law that was influenced by its construction of the *Chevron* test, this Court still would have jurisdiction to review the judgment below. See *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 152 (1984); *Delaware* v. *Prouse*, 440 U.S. 648, 652-653 (1979); R. Stern, E. Gressman, & S. Shapiro, SUPREME COURT PRACTICE 172 (6th ed. 1986) ("the Court may pass on the federal question that has been incorporated in the state law"). See also *Wold Engineering*, 467 U.S. at 158 n.16 ("uncertainty about the federal basis for the state-law decision is properly resolved in favor of the conclusion that federal law played a material role"). Accordingly, even under the theory put forward by NCSL, review in this case would be proper.

II. *SCHEINER* SHOULD BE GIVEN FULL RETROACTIVE APPLICATION

When Arkansas finally turns to the question whether the Commerce Clause principles announced in *Scheiner* should govern taxes collected for highway use between the time this suit was brought and the time *Scheiner* was decided, it entirely ignores our argument (Br. 12-13, 16, 32-33) that *Chevron* must be applied in light of the considerations set forth in *Owen* v. *City of Independ-*

[12] In theory, if it were possible to do so, Arkansas might be entitled to remedy the past discrimination by retroactively increasing the HUE tax on in-state truckers who benefited from the flat tax feature. But the State has never suggested this remedy, and it is unlikely that it could in fact be implemented.

ence.[13] Beyond that, the State's proposed application of the *Chevron* test misconceives the underlying purposes of the retroactivity doctrine and would impair rather than further basic Commerce Clause policies.

A. Foreseeability And Justifiable Reliance

Arkansas and its *amici* completely disregard the strong presumption that judicial decisions are to be applied retroactively, proposing instead a test that would turn that well-settled principle on its head. In their submission, the first prong of the *Chevron* test would, as a practical matter, be satisfied whenever the outcome of the case allegedly establishing a "new" rule could not have been predicted with reasonable assurance. This would strip most decisions of this Court of retroactive effect.[14]

[13] *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), is not to the contrary. In holding that punitive damages may not be imposed on a municipality under 42 U.S.C. § 1983, the Court specifically distinguished *Owen* on the ground that because punitive damages represent "a windfall to a fully compensated plaintiff, * * * there is no question here of equitably distributing the losses resulting from official misconduct" (453 U.S. at 267). Nor can it be said, as it was in *Fact Concerts* with regard to punitive damages, that the burden of a refund in this case would fall on "blameless or unknowing taxpayers" (*ibid.*). Here, the HUE tax unjustly enriched local taxpayers, and refunds can be financed by a nondiscriminatory tax that redistributes the burden more equitably.

[14] *Solem* v. *Stumes*, 465 U.S. 638 (1984), which respondents quote (Br. 30), does not help them. The Court there refused to apply a new rule in a collateral attack on a final judgment. By contrast, the issue here is not whether *Scheiner* would justify reopening a final decision, but whether the correct rule of law should be applied to a *pending* case. Significantly, the very rule that the Court refused to apply retroactively in *Stumes* was applied retroactively to cases still pending on direct appeal in *Shea* v. *Louisiana*, 470 U.S. 51 (1985).

Nor does the language of the *Lemon II* plurality justify nonretroactivity here. That opinion expressly disclaimed allowing "state officers to proceed with their business regardless of serious constitutional questions concerning state legislation" (411 U.S. at 208 n.8). What is more, *Lemon II* specifically concluded that the protection of reasonable reliance interests in that case (which, we note, were those of innocent third parties, not the state that had

In addition to this erroneous legal standard, the State also largely ignores the implications of the opinion in *Scheiner* itself, which, as we showed (Br. 21-24), treated its ruling as a logical and necessary application of Commerce Clause principles firmly established prior to enactment of the HUE tax. The Court's analysis of its precedents and their application to flat highway taxes is not in any way altered by the views expressed in the dissenting opinions.

Notwithstanding *Scheiner*'s reliance (107 S.Ct. at 2844) on the principle expressed in *Commonwealth Edison* that the *measure* of a tax must be tied to the extent of the taxpayer's in-state activities, Arkansas boldly asserts (Br. 31) that *Commonwealth Edison* actually supported the validity of flat highway taxes because the Court's opinion "put to one side" cases involving user fees and stated that such taxes "'cannot be tested by standards which generally determine the validity of [general revenue] taxes'" (453 U.S. at 621, 622 n.12). Pennsylvania made precisely the same argument in *Scheiner*, and it is no more availing here than it was there. As ATA explained in its reply brief in *Scheiner* (at 10-11), the clear import of footnote 12 of *Commonwealth Edison* was not the patently untenable proposition that user fees need not be fairly related to use, but rather the point that user charges are subject to an *additional* requirement of non-excessiveness that is inapplicable to general revenue taxes like Montana's severance tax.

Arkansas, like Pennsylvania in *Scheiner*, also seeks (Br. 31 & n.24) to draw support from the Court's

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violated the First Amendment) would "not substantially undermine the constitutional interests at stake in *Lemon I*" (*id.* at 201). This limitation on the Court's ruling is underscored by the subsequent decision in *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), which declined to follow *Lemon II*; as the Court explained, "[n]othing in *Lemon II* * * * suggests * * * a broad general principle * * * that every such unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment" (*id.* at 130).

citation to the old flat tax cases in *Massachusetts* v. *United States*, 435 U.S. 444, 463-464 (1978). But that case involved neither state taxes nor the Commerce Clause and referred to *Aero Mayflower* only by way of analogy—indeed, the majority in *Scheiner* did not consider it sufficiently material to discuss (compare 107 S.Ct. at 2849 (O'Connor, J., dissenting)). Significantly, because the tax challenged in *Massachusetts* was imposed by the federal government, there was no risk of cumulative tax burdens and no danger that taxpayers would suffer discrimination at the hands of a government in which they had no voice. Thus, nothing in *Massachusetts* rehabilitated flat taxes from the fatal implications of *Complete Auto* and *Commonwealth Edison*.[15]

Nor is the vitality of *Aero Mayflower* shored up by the claim (see Ark. Br. 32) that the Court had not used the phrase "internal consistency" before 1983. First, *Scheiner* rested not only on the concept of internal consistency but equally on the existence of actual discrimination against out-of-state truckers (see 107 S.Ct. at 2836, 2841, 2847)—a clear Commerce Clause violation under principles settled by the earlier cases, such as *Boston Stock Exchange*, 429 U.S. 318 (1977), on which *Scheiner* relied. Indeed, in citing (Br. 32) Professor Hellerstein's article, Arkansas fails to note his comment that "the commerce clause concerns of discrimination and multiple tax burdens that the Court addressed with the aid of the 'internal consistency' principle in * * * *Scheiner* could as easily have been dealt with by a rigor-

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[15] Especially insupportable is Arkansas' suggestion (Br. 26 n.18) that Congress somehow approved "flat taxes such as those at issue here." The quoted House Report was issued in June 1980, before a single one of the flat highway taxes that have been the subject of *Scheiner* and related litigation was in force (only trivial flat decal fees of two or three dollars existed at the time). These legislative materials were called to the Court's attention in *Scheiner* but were not found persuasive; they are even less relevant to the retroactivity issue here.

ous application of traditional apportionment principles." 87 Mich. L. Rev. at 177.

B. Furtherance Of Commerce Clause Policies

We argued in the opening brief (at 27-33) that retroactive application of *Scheiner* would advance the policies of the Commerce Clause both by restoring in-state and interstate commerce to a plane of equality and by supplying needed incentives to state and local governments to resist the temptation to engage in discriminatory taxation. The State responds by asserting (Br. 32-34) that tax refunds would not cure any past adverse effects on commerce of the HUE tax, that the tax never in fact deterred truckers from operating in Arkansas, and that the conduct of the Arkansas legislature and courts in adopting and perpetuating the HUE tax reveals satisfactory compliance with national free trade interests.

The State's argument stubbornly ignores the systemic consequences of a regime in which the invalidation of unconstitutional (but politically popular) taxes is limited to prospective effect. Without the availability of a refund remedy, aggrieved taxpayers would be doubly discouraged from engaging in interstate commerce: not only would they have to bear the discrimination during the pendency of litigation, but even if they prevailed they would never be able to recover the amounts wrongfully taken from them. Thus, an *ex ante* rule that retroactive refund relief is generally unavailable would frustrate what Arkansas itself describes (Br. 32) as the primary purpose of the Commerce Clause: "to prevent commerce among the States from being deterred." [16]

[16] In this connection, it is hard to take seriously Arkansas' suggestion (Br. 33) that interstate commerce is not burdened by the economic impact of a seriously discriminatory tax if the benefit of the activity being taxed—operating in Arkansas at the national norm of 80,000 pounds rather than having to skirt the State—exceeds the amount of the tax (see also Ark. Br. 38-39). This formulation would lead to the conclusion that discriminatory taxation of interstate commerce need hardly ever be of concern, since it is rare indeed that the level of any tax is so high as to confiscate the entire value of the taxed activity.

We leave it to the Court to determine from the history of this case whether Arkansas authorities—legislative, executive, and judicial—acted with due regard for the interests protected by the Commerce Clause. Even if they did, that hardly refutes the logic (or practicality) of our point that—in the generality of situations—state authorities should appreciate that they cannot count on retaining the benefits to local taxpayers inherent in enactment of parochial, discriminatory tax legislatation. See McKesson Br. 15 (statement of Florida legislator).

C. Showing Of Inequity

It is the State's burden to show that retroactive application of *Scheiner* would produce "'substantial inequitable results'" entailing "'injustice or hardship'" (*Chevron*, 404 U.S. at 107). Its effort to do so (Br. 34-41) reflects a profound misunderstanding of the facts and law underlying both *Scheiner* and the instant case—beginning with its attempt to shift the burden of showing inequity to petitioners. Significantly, although the third prong of the *Chevron* test focuses on the hardship to the proponent of non-retroacitvity, Arkansas nowhere argues that the payment of refunds would seriously strain the State's treasury or disrupt its highway programs; for the reasons discussed in our opening brief (at 35-38), such a claim would not be sustainable.

1. Arkansas' principal argument on the equities (Br. 34-38) appears to be that the HUE tax caused no actual discrimination against the members of the plaintiff class and that the same was true of the axle tax considered in *Scheiner*, which, according to Arkansas (Br. 38), was not invalidated because actually discriminatory. The decision of the Arkansas Supreme Court certainly did not rest on any such supposition; to the contrary, the opinion noted (Pet. App. 2a) that "[i]t is conceded that the HUE tax effectively costs other truckers more per mile

than it costs those based in Arkansas * * *." Even were it appropriate to reconsider the finding in this forum, the State has offered no acceptable justification for overturning it.[17]

Arkansas makes the baffling assertion that because the original group of plaintiffs was divided into two subclasses, Arkansas base-registered and non-Arkansas base-registered, this case involves no claim that the discrimination favors Arkansas *intra*state truckers at the expense of interstate operators.[18] It is true that, because of the readier availability of data (see R. 1597-1598), petitioners' evidence in the trial court compared Arkansas and non-Arkansas interstate operators. It is manifestly untrue, however, that the right to operate unlimited miles on the State's highways for a flat $175 annual fee did not discriminate in favor of those who

[17] Arkansas challenges (Br. 5 n.3, 35 n.32) the adequacy of ATA's study showing a discrimination of more than 3:1 against out-of-state trucks. But as we have previously explained in more detail (see J.S. 4, *ATA* v. *Gray*, No. 86-358), the record in this case sufficed to prove the 3:1 figure, which was corroborated by the State's own calculations showing that out-of-state trucks paid a per-mile HUE tax that was 320% of that paid by Arkansas-based trucks. (In fact, it seems virtually certain that the survey data substantially *understate* the extent of the discrimination by omitting Arkansas intrastate operators, who, because they conducted all of their operations on Arkansas highways, were necessarily the greatest beneficiaries of the flat feature of the HUE tax (see note 19, *infra*).) Indeed, not only the Arkansas Supreme Court but the Chancery Court (J.A. 27) and Justice Blackmun (Pet. App. 11a) all concluded that the HUE tax actually discriminated to a substantial extent against non-Arkansas truckers, and the State has provided no basis to reject those conclusions here. See also *Scheiner*, 107 S.Ct. at 2841 (flat highway taxes result in actual and substantial discrimination against out-of-state taxpayers).

[18] The State fails to note that the challenge to the flat aspect of the HUE tax (Count I of the complaint) was brought only by the non-Arkansas subclass (see J.A. 14-16). The Arkansas-carrier subclass advanced or joined in other claims that are no longer part of this case (J.A. 16-17). Thus, the State is clearly mistaken in suggesting (Br. 36) that petitioners' grievance involves solely an internal dispute within the class of challengers to the HUE tax.

surely drove the *most* miles in the State—the purely intrastate operators.[19] The record thus forecloses acceptance of Arkansas' invitation to assume that the tax caused no actual discrimination against interstate commerce.

In asking this Court to overturn the findings below that the HUE tax actually discriminates against out-of-state trucks, the State also asserts (Br. 36-37 & n.36) that trucks generally do not travel more miles in the state in which they are base-registered than in other states and that this is shown by *Scheiner* itself.[20] But neither *Scheiner* nor anything else adduced by the State supports this erroneous contention. Central to the determination of discrimination in *Scheiner* was the fact that the average Pennsylvania-registered vehicle drove five times as many miles for its tax dollar as the average non-Pennsylvania vehicle (see 107 S.Ct. at 2836, 2841).[21] This discrimination inheres in flat highway

[19] The State's assertion (Br. 36 n.33) that it is "unknowable" whether intrastate truckers were favored by the HUE tax is poppycock. According to the Federal Highway Administration, the typical truck subject to the HUE tax travels about 70,000 miles per year (J.A. 63). Even supposing that Arkansas intrastate trucks operated just half that much, their per mile HUE tax cost would be 0.5¢, less than one-sixth the 3.2¢ per mile average cost for petitioners—a figure accepted by the State's own expert witness (J.A. 69).

[20] The State seeks to support this argument with the claim (Br. 35) that the state of base-registration is irrelevant because the IRP allows interstate carriers great flexibility in selecting where to register their vehicles. This contention invites the Court to disregard the most flagrantly discriminatory aspect of the tax—the benefits conferred on Arkansas *intra*state operators—and ignores the fact that Pennsylvania too was a member of the IRP, so that interstate carriers based in that State presumably had the same flexibility of registration.

[21] Arkansas' assertion (Br. 37 n.36) that the Court's references to a 5:1 discrimination in *Scheiner* related solely to the marker fee is indefensible. The decision speaks unambiguously of "*each* of the flat taxes" (107 S.Ct. at 2836; emphasis added) and specifically describes data showing the discriminatory impact of the *axle tax* in footnote 10 and the accompanying text, which Arkansas fails to cite.

taxes, which by their nature benefit frequent users of the taxing state's highways at the expense of less frequent users, and it lies at the heart of the ruling in *Scheiner*.[22]

Arkansas next attempts (Br. 37-38) to resurrect the argument made by Pennsylvania in *Scheiner* that any discrimination is offset by the higher registration fee per mile paid by in-state trucks. But the answer given in *Scheiner* is equally apt here: a discriminatory flat tax "cannot be vindicated as a 'rational restructuring of burdens' simply because it arguably benefits a class of truckers that pays more [in registration fees] to use the State's highways than does another class of highway users" (107 S.Ct. at 2843). As the Court correctly understood, registration fees, by virtue of the IRP and reciprocity agreements, do not discriminate against out-of-state carriers or impose cumulative burdens on interstate commerce (see *id.* at 2834, 2840, 2842-2843); thus they are simply irrelevant to the validity of flat taxes that do entail such discrimination and burdens.[23]

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[22] The State apparently has been confused (see Br. 37 n.36) by the Court's observation in *Scheiner* that "out-of-state vehicles and in-state vehicles subject to the axle tax traveled approximately the same number of miles on Pennsylvania's highways" (107 S. Ct. at 2836). Arkansas overlooks the fact that there were many more out-of-state than in-state trucks, so that the average Pennsylvania mileage per truck was much higher for the Pennsylvania-based carriers. The manifest discrimination against out-of-state trucks is shown by the Court's statement immediately following the above quotation that "less than 1/6 of the State's total axle tax revenues were generated by Pennsylvania based vehicles" (*ibid.*).

[23] Furthermore, the per-mile registration fee figures and the accompanying hypothetical offered by Arkansas (Br. 37-38 & n.38) are quite misleading. They are predicated on the unsubstantiated and erroneous supposition (see J.A. 63-66) that Arkansas and non-Arkansas trucks will operate a *different* number of total miles. In part because of the IRP, however, trucks operating the *same* number of total miles will have the same Arkansas per-mile registration fee cost, regardless of what proportion of their total miles is in Arkansas.

2. It is likewise irrelevant that we do not challenge the HUE tax as excessive and that out-of-state trucks derived benefit from Arkansas' expenditures for highway maintenance (see Ark. Br. 38-39).[24] The constitutional vice in flat taxes is discrimination, not excessiveness. The problem in this case, as in *Scheiner*, is that out-of-state truckers were being made to pay for most of the wear and tear caused by in-state trucks. Significantly, the State is unable to offer any response to the football game hypothetical in our opening brief (at 39-40), which reveals the logical flaw in its position.[25]

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[24] The State frequently predicates its arguments on factual assertions that have only the most tenuous record basis and were not found as facts by the Arkansas courts. For example, on the question of added highway maintenance necessitated by trucks weighing between 73,280 and 80,000 pounds, respondents repeatedly (Br. 4, 12, 39, 41) claim an annual cost of $53 million. ATA's record evidence, however, stated the correct figure to be as low as $8 million (see J.A. 151). While the cost to the State should be wholly irrelevant to this discrimination case, the Court should not in any event rest its decision on the State's controverted figure.

[25] The State insinuates (Br. 39) that petitioners suffered no injury from the HUE tax because they "could and apparently did" pass the expense on to their customers through ICC tariffs. That claim was neither raised below nor relied on by the Arkansas Supreme Court. It rests entirely on a few lines of testimony about what one specific trucker might seek to do in the future, with not so much as an iota of evidence that any trucker ever actually "passed on" any part of the HUE tax. This argument is simply too little and too late. Furthermore, it is far from clear, as a matter of either economics or common sense, that a "pass on" defense should be allowed in the case of a tax that is not separately stated or imposed on customers in individual transactions—as distinguished from, *e.g.*, a sales tax. Nor is it clear whether or to what extent the highway tax could be passed on by truckers, which much compete with other modes of transportation that were not subject to the tax, or what amount of business truckers would lose as a result. Finally, we note that in the two states where this "pass on" defense was properly raised in connection with flat highway taxes, it has been rejected as a defense to a retroactive refund remedy. See *ATA* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-287 (Vt. Super. Ct., Wash. Co., May 4, 1987); *ATA* v. *Kline*, No. 07-14-

3. Arkansas next suggests (Br. 39-40) that refunds should be denied because of the "intolerable" administrative burdens associated with implementing a remedy involving partial refunds. That concern—on which the Arkansas Supreme Court did not rely—has little if anything to do with the "substantial inequity" prong of *Chevron*. And, of course, there would be no administrative inconvenience associated with implementing the remedy of full refunds apparently provided by Arkansas law when taxes have been "illegally exacted."

Even if the refunds were confined to the "discrimination component" of petitioners' tax payments, administering them would not prove unmanageable. For example, calculation of the amount by which the category of out-of-state truckers (with an average rate of 3.2¢/mile) paid more than in-state truckers (an average of 1¢/mile) would not be difficult. Even a more individualized computation would be facilitated by the existence of fuel tax records, which show annual Arkansas mileage for each interstate trucker, and by the survey data already in the record. The task would be no more difficult than in many other class actions that produce common funds that must be shared among class members who have suffered injuries of somewhat varying amounts. And even if the refund process were to prove more complex than it appears, that would afford no equitable ground for denying relief altogether.

4. Finally, a word is in order about the crocodile tears Arkansas sheds (Br. 12, 40) over the burdens that might be imposed on interstate commerce by the taxes it would adopt to cover any refund obligation arising from this litigation. This argument conveniently overlooks the fact than any such taxes would have to be nondiscriminatory; for the out-of-state truckers previously discriminated against, any tax increase would be more than offset by the refunds they would receive; and while the heavier

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1667-85 MVT (N.J. Tax Ct. Sept. 8, 1988) (copy lodged with Clerk of this Court).

users of Arkansas' highways (mostly Arkansas-based) might have to pay higher taxes, the amount would not exceed that necessary to remove the financial advantage they previously enjoyed. Beyond that, the State totally ignores the fact that a variety of means exist to ameliorate the impact of the refunds—such as use of long-term bonds or payment of the refunds in installments over several years. See Pet. Br. 37-38.

III. TAXES FOR THE POST-*SCHEINER* YEAR SHOULD BE REFUNDED

Arkansas does not dispute that a prospective decision normally becomes effective on the date it is announced. Nor does it dispute that the critical event here in giving prospective application to *Scheiner* is the use of the State's highways, not the actual payment of the tax. Thus, unless the effectiveness of *Scheiner* could properly be suspended past June 23, 1987, it is conceded that all HUE taxes paid for use of Arkansas' highways during the 1987-1988 tax year (which began on July 1, 1987) would be subject to refund regardless of when paid.

Significantly, the State does not defend the rationale of the Arkansas Supreme Court that *Scheiner* took effect on August 14, 1987, when Justice Blackmun's escrow order explicitly indicated the probable invalidity of the HUE tax. Rather, under the State's theory, the HUE tax apparently did not become unconstitutional either until "the state legislature [had] time to reassess its tax structure in light of *Scheiner*" (Ark. Br. 42), which was October 9, 1987, or "until the state court concluded its deliberations" (*id.* at 41) on the validity of the HUE tax, which was March 14, 1988.[26] In either event, the

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[26] Little credence can be given to the claim (Ark. Br. 42) that the prompt invalidation of the HUE tax would have eliminated the authorization for heavy trucks to use Arkansas' roads. For one thing, Arkansas Highway Department regulations gave trucks until August 31, 1987, to be qualified for the July 1987-June 1988 tax year (HUE Tax Rules and Regulations, § V(1) (April 30, 1984)), so it is difficult to see what basis there would have been to ban highway use before that date. Moreover, such a ban would have jeopardized

State does not defend the judgment below, and its argument does not account for the return of the post-August 14 escrowed funds.

For all its protestations of uncertainty, the State makes no showing, nor could one sensibly be made, that there was the slightest doubt about the invalidity of the HUE tax in the wake of *Scheiner*. This Court would send a most unfortunate message to state and local governments if it held that they are free to continue to enforce plainly unconstitutional measures until it is convenient to formulate an alternative course of action. (We note that the NCSL and Arkansas' other *amici* do not support this aspect of its argument.) This case would be an especially unsuitable one for such action in view of the delay and obstruction that stalled relief on remand, described in our opening brief (at 4-6, 43-44).

It should be remembered, in this connection, that the issue here is not whether to punish state officials for any delay in implementing the principles of *Scheiner*, but rather whether to restore to petitioners that which was unconstitutionally taken from them. Arkansas was free to take as long as it reasonably needed to replace the HUE tax, but it should not be free to retain the taxes unlawfully exacted in the interim.[27]

The cases on which Arkansas relies (Br. 43) bear no similarity to the present situation and merely evidence the weakness of the State's position.[28] In *Northern Pipe-*

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the State's right to receive federal highway funding. Under the circumstances, this Court can be quite confident that, if the need had arisen, the offensive provisions of the statute would have been severed and the authority to operate at 80,000 pounds preserved.

[27] In contrast to the position taken here by Arkansas, New Jersey acknowledged in its flat tax case that post-*Scheiner* taxes had to be refunded. See *Kline*, slip op. 2.

[28] The State's discussion (Br. 43) of *Burlington Northern* neglects to mention that the prior tax regime that Congress altered was not unconstitutional. In such a case, there would of course be no objection to delaying the new scheme for whatever length of time seemed convenient.

line and *Buckley* this Court postponed the effective date of its own decision, and it did so by entering a stay of its judgment. It is one thing for this Court to have such authority, but it is an entirely different matter—and one that raises disturbing implications for our national judicial system—to have the same power vested in hundreds of state and lower federal courts around the country. Furthermore, those cases involved essentially procedural issues and did not countenance continuing infractions of substantive rights. In addition, the Court's action in each case was necessary to protect the rights and reliance interests of innocent third parties, not, as here, those of the very party whose conduct violated the Constitution. Finally, the exercise of such authority, even by this Court, has been and must continue to be confined to truly extraordinary circumstances rising to the level, for example, of the inability of the judicial system to adjudicate legal claims or the invalid composition of an entire agency of government. Nothing even remotely comparable is present here.

Respectfully submitted.

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APPENDIX

The Court has entered judgment on the merits in a large number of tax refund actions coming from state court in which, under respondents' theory of the Eleventh Amendment, the Court lacked jurisdiction to adjudicate the federal question brought before it for review. The cases listed are ones in which the plaintiff could have received only retrospective monetary relief because the tax had been repealed, or in which the case was described by this Court as being for refunds of past taxes paid under protest, with no indication that the taxpayer also sought prospective relief.

Texas Monthly, Inc. v. *Bullock*, No. 87-1245 (Feb. 21, 1989)

Shell Oil Co. v. *Iowa Dep't of Revenue*, 109 S.Ct. 278 (1988)

Western Air Lines, Inc. v. *Board of Equalization*, 107 S.Ct. 1038 (1987)

Williams v. *Vermont*, 472 U.S. 14 (1985)

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984)

Aloha Airlines, Inc. v. *Director of Taxation*, 464 U.S. 7 (1983)

Container Corp. v. *Franchise Tax Board*, 463 U.S. 159 (1983)

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983)

Minneapolis Star & Tribune Co. v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)

Western & Southern Life Ins. Co. v. *Board of Equalization*, 451 U.S. 648 (1981)

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980)

Central Machinery Co. v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980)

Heublein, Inc. v. *State Tax Comm'n*, 409 U.S. 275 (1972)

American Oil Co. v. *Neill*, 380 U.S. 451 (1965)

Department of Revenue v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964)

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